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IN THE

Supreme Court Of The United States

OCTOBER TERM, 1940

No. 330

OPP COTTON MILLS, INC., ET AL,
Petitioners,

versus

ADMINISTRATOR OF THE WAGE AND HOUR DIVISION OF THE DEPARTMENT OF LABOR,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

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ADMINISTRATOR OF THE WAGE AND HOUR DIVISION OF THE DEPARTMENT OF LABOR,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THE HONORABLE, THE SUPREME COURT OF THE UNITED STATES:

The Petition of the Opp Cotton Mills, Inc., Et Al, Petitioners, respectfully shows to the court as follows:

This matter arises under the Fair Labor Standards Act of June 25, 1938, 52 Stat. 1065 (Tit. 29 U. S. C. Secs. 201-19)

The Petitioner and the Intervenors (herein referred to as Petitioners), by petition for review to the United States Circuit Court of Appeals for the Fifth Circuit, pursuant to Section 10 of the Fair Labor Standards Act (Tit. 29 U. S. C. Sec. 10) sought to have said Circuit Court of Appeals review and set aside the Wage Order of the Administrator of the Wages and Hours Division of the Department of Labor signed on the 29th day of September, 1939, by which the Administrator attempted to establish a minimum wage of 32½ cents per hour for the Textile Industry.

SHORT STATEMENT

Pursuant to the terms of the Fair Labor Standards Act, the Administrator of the Wage and Hour Division appointed Industry Committee No. 1, and therein undertook to define the Textile Industry for which said Industry Committee was appointed.

Thereafter, the said Industry Committee, as appointed and convened under Administrative Order Nos. 1 and 2, and as re-constituted and continued by subsequent Administrative Orders, filed its majority and minority reports with said Administrator, the minority report filed on May 22, and the majority report being filed on May 23, 1939. Thereafter, the Administrator, on the 26th day of May, 1939, issued a notice of hearing on the Minimum Wage Recommendation and Report of the said Industry Committee, addressed to all parties concerned, setting hearings on the recommendation of said Industry Committee at Washington, D. C., June 19th and at Atlanta, Georgia, June 26, 1939.

Hearings were duly held at the times and places specified in said order and, on September 29, 1939, said Administrator made and published his findings and order approving and carrying into effect the recommendations contained in the report of the majority of said committee, and attempting to establish a minimum wage rate for the textile industry of 32½ cents per hour.

JURISDICTIONAL STATEMENT

On October 20, 1939, the Petitioner herein filed his petition in the United States Circuit Court of Appeals for the Fifth Circuit to have said order set aside; and the Intervenors, leave of court having first been had and obtained, intervened as co-parties with said Petitioner. Thereafter, on the 2nd day of April, 1940, said United States Circuit Court

of Appeals for the Fifth Circuit filed its opinion and entered its order, denying the relief prayed for by the Petitioner and Intervenors and affirming the action and Wage Order of the Administrator. Whereupon, a petition for re-hearing was filed in said court on the 19th day of April, which petition for re-hearing was denied by said court on the 16th day of May, 1940.

Jurisdiction of this matter is conferred upon this honorable court by Section 10 of the Act of June 25, 1938, entitled the Fair Labor Standards Act (Tit. 29 U. S. C. Sec. 210), and by Section 6 of the Act of March 3, 1891, as amended, (Tit. 28, U. S. C. Sec. 347).

QUESTIONS PRESENTED

The questions presented for the consideration of this honorable court on the granting of this Petition for Certiorari, are as follows, to wit:

I

Whether or not the Fair Labor Standards Act as sought to be applied and enforced against Petitioners by said Wage Order is void, unconstitutional, and unenforcible; Petitioners contending that it is unconstitutional and void for the following reasons:

1. The Fair Labor Standards Act is an invasion of the powers reserved to the states of the United States, under the 10th Amendment to the Constitution of the United States.

2. The Fair Labor Standards Act is not a valid exercise of the power conferred by the Commerce Clause, Article I, Section 8, Clause 3, of the Constitution.

3. The Fair Labor Standards Act constitutes an unwarranted delegation of legislative power to the Administrator in contravention of the Constitution.

4. The Fair Labor Standards Act deprives the Petitioners and Intervenors of their property without due process of law, in contravention of the Fifth Amendment to the Constitution.

5. The wage order promulgated by the Administrator for the textile industry deprives the Petitioners of their property without due process of law, in violation of the Fifth Amendment to the Constitution.

II

Whether the Wage Order promulgated by the Administrator of the Wage and Hour Division of the Department of Labor was in accordance with the requirements, and not in excess of the powers conferred by the Fair Labor Standards Act; Petitioners contending that it was illegal and invalid for the following reasons and in the following particulars, to wit:

1. That the Textile Industry was not properly defined as required by the Fair Labor Standards Act.

2. Industry Committee No. 1 was not constituted with due regard to the geographical regions affected thereby, as required by the Fair Labor Standards Act.

3. The procedure of the Industry Committee was not in accordance with law.

4. The conclusion of the Administrator that the proposed minimum wage will not substantially curtail employment in the textile industry and, particularly, in the Southern Small Mill Group, is not supported by substantial evidence.

5. The finding of the Administrator that the minimum wage should be uniform, that is, without classifications, is not supported by substantial evidence, and is contrary to law.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

Petitioners represent that it will be impossible for them and other small cotton mills of the deep South to operate under the Wage Order, without differentials or classifications, and that it will be necessary for them to close their mills, resulting in a confiscation of their property and loss of their investments; and that they are and will be vitally affected by the matters presented by this petition and the threatened enforcement of the Wage Order made pursuant to the authority sought to be assumed by the Administrator under the terms of the Fair Labor Standards Act.

They further represent that the questions involved in this petition are of paramount importance, involving as they do, the processing of the cotton crop which represents the primary basis of the economic life of a large section of the Nation, and that the legal questions involved in the decision of the Circuit Court of Appeals are of vital importance and have not been, but should be, settled by the decision of this Honorable Court. They further represent that the said court has decided Federal questions in a way probably in conflict with the applicable decisions of this Honorable Court; and, for said reasons and on the grounds herein enumerated, and as amplified in the brief annexed to this petition, a writ of certiorari should be granted.

CONCLUSION AND PRAYER

Petitioners present herewith a certified transcript of the record in the case, including the proceedings in the Circuit Court of Appeals for the Fifth Circuit, all prepared and submitted in accordance with written stipulation between counsel for the parties, duly filed with this court, and appearing in the transcript.

Petitioners respectfully represent that they are advised that because of the public interest in the questions presented by this petition, the respondent will join in the prayer that writ of certiorari may be granted; they show further that the record herewith presented is, by said stipulation of the parties, the record for use on the petition for a writ of certiorari and for the consideration by the court of the case on the merits if the petition is granted.

Petitioners further present herewith a brief, in direct and concise form, and embracing its specifications of error, a summary of Petitioners' argument and list of authorities in support of the petition.

WHEREFORE, for the purpose of correcting the errors complained of and to the end that the rights of your petitioners may be determined in accordance with the constitution and laws of the United States, and that the cause may be reviewed and determined by this court as provided by law; your Petitioners respectfully pray that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Fifth Circuit, commanding said court to certify and send to this court, on a day to be therein designated, a full and complete transcript of the record and proceedings of said Circuit Court of Appeals in this case (according to stipulation of counsel with respect to said record and proceedings); and that the order and decree of the said Circuit Court of Appeals may be reviewed and determined as provided by law, and that said decree and judgment of said Circuit Court of Appeals may be reversed by this Honorable Court, and that your petitioners may have such other and further relief or remedy in the premises as to this court may seem appropriate.

OPP COTTON MILLS, INC.,
Petitioner

Dent. Cameron
Attorney

J. F. AMES, doing business as Selma Manufacturing Company
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THE ALDEN MILLS
GENEVA COTTON MILLS
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POULAN COTTON MILLS
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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

This brief is filed in support of the Petition for Writ of Certiorari to review the action of the United States Circuit Court of Appeals for the Fifth Circuit in affirming the Wage Order of the Respondent, prescribing a minimum wage of 32½ cents per hour for the Textile Industry.

OPINION BELOW

The opinion of the Circuit Court of Appeals for the Fifth Circuit is reported as No. 9313 on the docket of said court, Opp Cotton Mills, Inc., Et Al, Petitioners, v. Administrator of the Wage and Hour Division of the Department of Labor, Respondent, 111 F. 2d. 23.

JURISDICTIONAL STATEMENT

The questions herein involved, being the validity of the Wage Order of the Administrator of the Wage and Hour Division of the Department of Labor, are specifically committed to the jurisdiction of this court by Section 10 of the Fair Labor Standards Act of June 25, 1938, 53 Stat. 1065 (Tit. 29 U. S. C., Sec. 210), and by Section 240 of the Judicial Code (Tit. 28, U. S. C., Sec. 347).

STATEMENT OF THE CASE

Immediately after the creation of the Wage and Hour Division of the Department of Labor, the Administrator, by Administrative Order No. 1, undertook to appoint an industry committee, pursuant to the terms of the Act, to be organized and designated as Industry Committee No. 1 for the Textile Industry. The Administrator incorporated in his order a definition of the Textile Industry for which the committee was appointed. The definition contained in the order was amended on two separate occasions, the last being one day prior to the filing of the report of the committee. The amendments to the definition were material and substantial in that they changed the limits within the indusry in which the committee was to function and the number, occupation and personnel of the employees who would be affected by such wage order as might be adopted pursuant to the recommendation of the committee.

In defining the industry, the administrator arbitrarily excluded wool and other sections of the textile industry in which high wages were paid and arbitrarily included twine, cordage and other industries whose products were not textiles. The apparent purpose of this arbitrary classification and grouping was to avoid any activity on the part of the

committee looking toward the establishment of classifications within the industry for the purpose of establishing wage differentials as provided in the Act.

The cotton textile branch of the textile industry, cordage, twine, and similar products, are the low wage segments of the spinning and weaving industry. Approximately 75% of those who work in cotton textile mills are employed in establishments situated in the cotton growing states. Under the terms of the Act [Sec. 5(b)], it was the duty of the Administrator to give due regard to the geographical regions in which industry was carried on when he appointed the persons to represent the various groups allowed representation on the committee. Thus, in appointing the committee, the Administrator should have appointed 75% of each group from the cotton growing states. [Fair Labor Standards Act, Sec. 5(b)]. However, the committee as finally constituted gave the cotton growing states a representation of only 42.4%.

The committee held four meetings, their dates being October 11, December 14, 1938, March 21, and May 22, 1939. The first meeting was devoted to getting acquainted with the Administrator, his counsel and staff, and in hearing general explanations and discussions of the duties of the committee. Thereupon, sub-committees were appointed to handle certain phases of the work, and it was decided to invite various members of the industry to come before a subsequent meeting.

At the second meeting of the committee, a sub-committee was appointed to study the matter of a minimum wage to be recommended. This sub-committee never arrived at any recommendation to be made on the matter of the minimum wage, and reported back its inability to agree.

At the third meeting, the report of the sub-committee was received, and without discussion, hearing, or study, the committee adopted the motion of one of its members that a minimum wage of 32½ cents per hour be recommended to the Administrator and that a sub-committee be appointed to draft the report. The task of drawing the report and recommendation was subsequently committed to employees on the staff of the Administrator of the Wage and Hour Division. This report was prepared and submitted to the meeting of May 22, at which it was adopted and submitted to the Administrator.

Three days after the majority report of the committee was filed with the Administrator, a notice of hearing thereon was issued and was later published in the Federal record. The dates and places for hearing provided for in the notice were the Raleigh Hotel, Washington, D. C., on June 19, 1939, and the Ansley Hotel, Atlanta, Georgia, on June 26, 1939. Hearings were held at the times and places designated, and again in Washington, D. C. On September 29, 1939, the Administrator published his findings and conclusions, together with his order approving and adopting the recommendation of the majority of the committee.

On the hearing before the Administrator, there was substantial evidence to the effect that there was a large difference in the prevailing wage rate then in effect in the southern or cotton growing states, and particularly in the small southern cotton mills and those paid in other sections of the country. There was no competent evidence tending to contradict this contention. There was direct testimony before the Administrator, by witnesses qualified to testify from their own knowledge, that living costs were substantially lower in the cotton producing states,—and particularly in the small towns and villages where the mills of these petitioners were lo-

cated,—than in other sections of the country and in the large cities. There was no evidence whatever to contradict this contention. As establishing the contrary, the Administrator heard and accepted conclusions based on statistical surveys made over a limited area and in communities where no cotton mills were located by persons whose qualifications were not shown, who did not appear as witnesses, and whose basic data was not made available on the hearing.

It was shown without contradiction that wage differentials had been uniformly recognized by the Federal Government under such activities as the National Recovery Administration, the Social Security Administration, the Government Contract Payment (Walsh-Healy) Act, the Works Progress Administration wage scale, as well as under existing labor contracts; and that the requirements of freight rate differentials had brought about existing differences in wage scales in the various sections of the country in which the textile industry was located.

It was shown without contradiction that the effect of the raise in wage rates from 25 cents per hour to 30 cents per hour would cause a number of mills then in operation to go out of business and that since these mills were not as modern and as well equipped with labor saving devices and machinery, the larger mills supplying the demand previously met by the smaller mills would not absorb the consequent unemployment. It was also shown that the employees displaced by the closing of the smaller mills would not be able to obtain employment in the larger mills because of their lack of training and inability to migrate to the mills whose output would be increased.

In making his findings, the Administrator disregarded the undisputed, direct testimony, and undertook to support his conclusions from findings made by witnesses who at-

tempted to qualify as experts in the analysis and interpretation of statistical data, and who testified from the data furnished them, without the same having been identified or vouched for by the statistician who compiled it or who collected and analyzed it.

Notwithstanding the elimination of the consideration of wage differentials from the deliberation of the committee, the Administrator found that there was no valid objection to, or irregularity in, the definition made and promulgated on the day preceding the filing of the majority report of the committee. Notwithstanding the clear and explicit terms of the Act, the Administrator found that the committee had properly performed its function, although it had eliminated the consideration of wage differentials, differentials in transportation costs, differentials in mill output per man-hour, and differences in actual taxes paid by mills. The administrator found, without any competent, substantial evidence to support the finding that the recommendation of the committee was supported by substantial evidence, and was made according to law.

SPECIFICATIONS OF ERROR

The Circuit Court of Appeals for the Fifth Circuit erred in its action in affirming the findings and conclusions of the Administrator of the Wage and Hour Division of the Department of Labor and in affirming the wage order entered thereon, for the following reasons, to-wit:

I

The Fair Labor Standards Act, as interpreted and applied, is unconstitutional because the powers sought to be exercised by Congress, as provided by the terms and provisions thereof, are not within the powers of the National Government but are reserved to the various states under the Tenth Amendment.

Bailey v. Drexel Furniture Co., 259 U. S. 20; 66 L. Ed. 817.

Coe v. Errol, 116 U. S. 517; 29 L. Ed. 715.

Champlin Refining Co. v. Corp. Com., 286 U. S. 210; 76 L. Ed. 1062.

Carter v. Carter Coal Co., 298 U. S. 238; 80 L. Ed. 1160.

Collins v. New Hampshire, 171 U. S. 30; 43 L. Ed. 60.

Chassanoil v. Greenwood, 291 U. S. 584; 78 L. Ed. 1004.

Dartmouth College v. Woodward, 4 Wheat, 518, 629; 4 L. Ed. 629, 657.

Fuller v. United States, 213 U. S. 138; 63 L. Ed. 757.

Hammer v. Dagenhart, 247 U. S. 251; 62 L. Ed. 1104.

Heisler v. Thomas Colliery, 260 U. S. 245; 67 L. Ed. 237.

Kidd v. Pearson, 128 U. S. 26; 32 L. Ed. 346.

Oliver Iron Mining Co. v. Lord, 262 U. S. 172; 67 L. Ed. 929.

Panama Refining Co. v. Ryan, 293 U. S. 388; 79 L. Ed. 446.

Rickert Rice Mills v. Fontenot, 297 U. S. 110; 80 L. Ed. 513.

Schechter Poultry Co. v. U. S., 295 U. S. 495; 79 L. Ed. 1570.

United States v. Ohio Oil Co., 234 U. S. 548; 58 L. Ed. 1459.

United States v. Butler, 297 U. S. 1; 80 L. Ed. 477.

II

The Fair Labor Standards Act is not a valid exercise of the power conferred upon Congress by the Commerce Clause (Article 1, Sec. 8, Clause 3).

Bacon v. Illinois, 227 U. S. 504, 516; 57 L. Ed. 615.

Board of Trade v. Olsen, 262 U. S. 1; 67 L. Ed. 839.

Coe v. Errol, 116 U. S. 517; 29 L. Ed. 715.

Crutcher v. Kentucky, 141 U. S. 57; 35 L. Ed. 649.

Carter v. Carter Coal Co., 298 U. S. 238; 80 L. Ed. 1160.

Coronado Coal Co. v. United Mine Workers, 268 U. S. 295; 69 L. Ed. 963.

Dartmouth College v. Woodward, 4 Wheat, 518, 629; 4 L. Ed. 629, 657.

Delaware L. and W. R. Co. v. Yurkonis, 238 U. S. 439; 59 L. Ed. 1397.

Gibbons v. Ogden, 9 Wheat 1; 6 L. Ed. 23.

Hammer v. Dagenhart, 247 U. S. 251; 62 L. Ed. 1104.

Hoke v. U. S., 227 U. S. 308; 57 L. Ed. 523.

Kidd v. Pearson, 128 U. S. 26; 32 L. Ed. 346.

Ken. Whip & Collar Co. v. Ill. Ct. R. Co., 299 U. S. 334; 81 L. Ed. 270.

Lottery Cases, 188 U. S. 355; 47 L. Ed. 492.

McDermont v. Wisconsin, 228 U. S. 115; 57 L. Ed. 754.

Mulford v. Smith, 307 U. S. 38; 83 L. Ed. 1092.

Milk Control Board v. Eisenberg Farm Pdts., 306 U. S. 346; 83 L. Ed. 752.

NLRB v. Jones & Laughlin S. Corp. 301 U. S. 1, 37; 81 L. Ed. 893.

Old Dearborn D. Co., v. Seagram Distlg. Corp., 299 U. S. 183; 81 L. Ed. 109.

Schechter Poultry Co. v. U. S., 295 U. S. 495; 79 L. Ed. 1570.

Second Employers Liability Cases, 223 U. S. 1; 56 L. Ed. 327.

Stafford v. Wallace, 258 U. S. 495; 66 L. Ed. 735.

Santa Cruz Fruit Packing Co. v. NLRB, 303 U. S. 453; 82 L. Ed. 954.

Texas & P. v. U. S. (Shreveport case), 234 U. S. 342; 58 L. Ed. 1341.

U. S. v. Rock Royal Cooperative, 307 U. S. 533; 83 L. Ed. 1446.

United Mine Workers v. Coronado Coal Co., 259 U. S. 344; 66 L. Ed. 975.

Weber v. Freed, 239 U. S. 325; 60 L. Ed. 308.

III

The Act is unconstitutional because by it Congress attempted to delegate non-delegable legislative powers to the Administrator.

Mulford v. Smith, 307 U. S. 38; 83 L. Ed. 1092.

Panama Refining Co. v. Ryan, 293 U. S. 388; 79 L. Ed. 446.

Schechter Poultry Co. v. U. S., 295 U. S. 495; 79 L. Ed. 1570.

U. S. v. Rock Royal Cooperative, 307 U. S. 533; 83 L. Ed. 1446.

IV

The Fair Labor Standard Act is unconstitutional because it deprives the petitioners of their property without due process of law in contravention of the Fifth Amendment.

Adair v. U. S., 208 U. S. 174; 52 L. Ed. 436, 442.

Adkins v. Childrens Hospital, 261 U. S. 525; 67 L. Ed. 785.

Chicago, Etc., R. Co. v. Chicago, 166 U. S. 226; 41 L. Ed. 979.

Coppage v. U. S., 236 U. S. 14; 59 L. Ed. 446.

Home Telephone Co. v. Los Angeles, 227 U. S. 278; 57 L. Ed. 510.

Lawton v. Steel, 152 U. S. 133; 38 L. Ed. 385.

Louisville v. Radford, 295 U. S. 555; 79 L. Ed. 1593.

Morehead v. New York, 298 U. S. 587; 80 L. Ed. 1347.

Monongahela Nav. Co. v. U. S., 148 U. S. 312; 37 L. Ed. 463.

Murry v. Hoboken, 18 How. 272; 15 L. Ed. 372.

U. S. v. Chicago M. St. P. & P. R. Co., 282 U. S. 311; 75 L. Ed. 359.

West Coast Hotel Co. v. Parrish, 300 U. S. 379; 81 L. Ed. 703.

Wilson v. New, 243 U. S. 332; 61 L. Ed. 755.

V

The wage order is void because the definition of the textile industry, as set out in the findings of the Administrator, was not seasonably made or in compliance with the requirements of the Fair Labor Standards Act.

VI

The wage order is void because Industry Committee No. 1 was not constituted and appointed as required by Section 5(b) of the Fair Labor Standards Act.

VII

The wage order is void because the Administrator's findings that the proposed minimum wage will not substantially curtail employment, or give a competitive advantage to any group in the industry, is not supported by substantial evidence as required by Section 8(d) of the Fair Labor Standards Act.

NLRB v. Bell Oil & Gas Co. (C. C. A. 5, 1938); 98 F. (2d) 406.

South Ala. Co. v. Com. Int. Rev. (C. C. A. 5, 1939) 104 F. (2d) 27.

Morris v. Harmer, 7 Peters 554; 8 L. Ed. 781.

Florida v. U. S., 282 U. S. 194; 75 L. Ed. 291.

Panama v. Ryan, 293 U. S. 388; 79 L. Ed. 446.

VIII

The wage order is void because the Industry Committee did not proceed in accordance with the requirements of Section 8 of the Fair Labor Standards Act.

IX

The wage order is void because the establishment of a minimum wage of 32½ cents and of a uniform minimum wage throughout the textile industry (without classfications or differentials) is contrary to the evidence introduced before the Administrator, and is contrary to Section 8 of the Fair Labor Standards Act and is not based on substantial evidence.

X

The wage order promulgated by the Administrator is void because the procedure and actions of the Committee and of the Administrator were not taken in accordance with the

rudimentary requirements of fair play as required by due process of law.

Morgan v. U. S., 298 U. S. 468; 80 L. Ed. 1288.

Morgan v. U. S., 304 U. S. 1; 82 L. Ed. 1129.

SUMMARY OF ARGUMENT

Under the established precedents this court will grant its writ of certiorari to review decisions of Circuit Courts of Appeal in the following situations and instances:

1. Where the question decided turns on an interpretation of Federal law, is of broad interest and grave importance, and has not been settled by this court.

Del Vecchio v. Bowers, 296 U. S. 280, 285; 56 S. Ct. 190; 80 L. Ed. 229, 232.

Schall v. Camors, 251 U. S. 239, 248; 40 S. Ct. 135; 64 L. Ed. 247, 252.

Toledo Newspaper Co. v. U. S., 247 U. S. 402, 411; 38 S. Ct. 560; 62 L. Ed. 1186, 1190.

United States v. Ness, 245 U. S. 319, 38 S. Ct. 118; 62 L. Ed. 321.

Chicago B and Q. R. Co. v. United States, 220 U. S. 559, 571; 31 S. Ct. 612; 55 L. Ed. 582, 587.

Montana Mining Co. v. St. Louis Mining, etc. Co., 204 U. S. 204; 27 S. Ct. 254; 51 L. Ed. 444.

2. Where the holding of the Circuit Court of Appeals is probably in conflict with a prior holding of this court.

Joplin Mercantile Co. v. United States, 236 U. S. 531, 535; 35 S. Ct. 291; 59 L. Ed. 705, 707.

3. Where the Circuit Court of Appeals falls into error in the interpretation and application of prior holdings of this

court, or has relied upon inapposite decisions of this court to sustain its decision on a doubtful question.

United States v. Reynolds, 250 U. S. 104, 108; 39 S. Ct. 409; 63 L. Ed. 873.

Grigsby v. Russell, 222 U. S. 149, 155; 32 S. Ct. 58; 56 L. Ed. 133, 136; 36 L. R. A. (N. S.) 642, Ann Cas. 1917B863.

4. Where there is a question of the extent of the jurisdiction or power of the tribunal in which the controversy arose to do and perform the act complained of or to make the findings upon which its action is based.

Cochran v. Montgomery County, 199 U. S. 260, 270; 26 S. Ct. 58; 50 L. Ed. 182.

Kingman and Co. v. Western Mfg. Co., 170 U. S. 675; 18 S. Ct. 786; 42 L. Ed. 1192.

I—Importance of Questions Involved

Since the constitutionality of the Act itself as well as the validity of the wage order here under attack are brought before the court by this petition, it seems that no argument need be made under this heading. However, it should be noted that the record in this case discloses over one thousand establishments producing more than one billion dollars worth of merchandise and consuming more than five million bales of cotton annually are to be affected by the order. The wages to be paid to the employees of these establishments, and the question of whether or not these employees are to continue to be employed, as well as the cost of the product to the ultimate consumer, and the resultant effect of the substantial changes in wage rates, employment, and consumers purchasing power, resulting from the enforcement of the order, make the ultimate decision of all of the issues presented by this petition a matter of concern to every individual living in the United States.

II—Conflict With the Prior Holdings of This Court

The Circuit Court of Appeals in its opinion did not question the proposition that the Wage and Hour Act was an attempt to regulate wages in industry. Its holding sustaining the Act is in direct conflict with the holding of this court in the case of *Hammer v. Dagenhart,* 247 U. S. 251; 38 S. Ct. 529; 62 L. Ed. 1101; 3 A. L. R. 649, Ann Cas. 1918 E. 724.

In the case last cited, this court held that the Commerce Clause of the Constitution did not provide authority to standardize the ages at which children might be employed in mining and manufacturing within the states, and that the manufacture or production of goods did not constitute commerce, or any part thereof, no matter what the intention of the manufacturer or producer might be. It was stated that commerce began by delivery to a carrier or the actual commencement of its transfer to another state. These pronouncements were not questioned by the dissenting justices.

The act here under review predicates no prohibition of transportation upon the kind or character of goods to be transported. Indeed, the prohibitions aimed at transportation are minor, as compared with other regulatory provisions, and are merely incidental to the expressed policy of the act to raise wages and lower hours in industry. Yet, the Circuit Court of Appeals states in its opinion, "We * * * hold that the enactment of the Fair Labor Standards Act was a valid exercise of the power given to Congress by the Commerce Clause of the Federal Constitution", and cites the case of *Hammer v. Dagenhart,* supra (111 F. 2d. at page 28). The rule of the Circuit Court of Appeals is in direct conflict with the rule announced by this court and not departed from or questioned in any subsequent case.

III—Inapposite Decisions Relied Upon

In at least two instances the Circuit Court of Appeals has asserted propositions on authority of decisions of this court in which no attempt had been made to determine the questions postulated by the court below in this case. The first of these deals with the question of what is substantial evidence such as would support a finding by the Administrator under Section 10(a) of the act. The Court said, "Substantial evidence can be found in the record to support the findings of the Administrator, and we are not willing, therefore, to overturn his order". As the basis for this holding, the Court cites the following cases:

Consolidated Edison Co. v. Labor Board, 305 U. S. 197; 59 S. Ct. 206; 83 L. Ed. 126.

Florida v. United States, 292 U. S. 1; 54 S. Ct. 603; 78 L. Ed. 1077.

Labor Board v. Waterman Steamship Corp., ... U. S. ..... ; 60 S. Ct. 493; 84 L. Ed. .....

In none of the cases cited was all the evidence reviewed, the competent segregated from incompetent, or any rule announced by which secondary evidence could be made to prevail over primary and undisputed proof. In none of the cases cited did this court hold that hearsay evidence or the conclusion of an absent witness not shown to have basic information, could be relied upon by the Administrator to refute direct testimony.

In *Consolidated Edison Co. v. Labor Board,* this court said (305 U. S. at 229, 83 L. Ed. at 140).

> "Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion * * *. The statute provides that 'the

> rules of evidence prevailing in courts of law or equity shall not be controlling'. The obvious purpose of this and similar provisions is to free administrative boards from the compulsion of technical rules so that the mere admission of matter which would be deemed incompetent in judicial proceedings would not invalidate the administrative order. * * * But this assurance of a desirable flexibility in administrative procedure does not go so far as to justify orders without a basis in evidence having rational probative force. Mere uncorroborated hearsay or rumor does not constitute substantial evidence."

The case of *Florida v. United States supra* does not deal with the question at all. There is a probability that the court was misled into relying upon this case by the language appearing on page 12 of the official report (292 U. S.) to the effect that it is not the province of the courts to substitute their judgment for that of the administrative body. More likely, the court was persuaded by that portion of the opinion which reads:

> "The purpose for which the Commission was created was to bring into existence a body which, from its special character, would be best fitted to determine, among other things, whether upon the facts in a given case there is an unjust discrimination against interstate commerce."

Under either contingency, the case cited does not support the conclusion. In the one instance, the application sought to be made is that, wherever the administrative body has found occasion to apply that elusive and indefinable element of its composition called judgment, the courts cannot interfere even if—as in this case—the court, exercising its own ability to weigh evidence, is driven to a conclusion, based on substantial evidence, contrary to that of the Administrator based on hearsay, speculation and surmise. In the other,

the Circuit Court cites this court as authority for saying that, since the administrative body is presumably expert in its field, its finding as to what is substantial evidence must be given greater weight than that of the court. These implications will remain until this court either adopts or repudiates them.

It is unfortunate for these petitioners that the case of *National Labor Relations Board v. Waterman S. S. Corporation* was decided just on the eve of the submission of this case to the Circuit Court of Appeals. In the Waterman case, in explaining the grant of the writ, this court referred, in the first footnote to the opinion, to every ruling of the Fifth Circuit Court of Appeals adverse to the Labor Board as having been cited by the Board in support of its contention that the said Court had failed "to give effect to the provisions of the Act that the findings of the Board as to facts, if supported by the evidence, shall be conclusive". In citing this case, the court below has done no less than to say to petitioners:

> "We think you are right and that the administrator has acted contrary to the vidence; but the Supreme Court has said, at least by implication, that, in every instance in which we have drawn an inference from the evidence different from that drawn by the Labor Board, we have ignored a plain provision of the Act".

The implication is made stronger when it is noted that this court cites in the note the case of *National Labor Relations Board v. Bell Oil and Gas Co.*, (5 Cir.) 98 F. 2d. 406, - - - being the only decision by the Fifth Circuit Court of Appeals in which an analysis of the statute has been attempted. The Labor Board did not see fit to apply for a writ in that case. The rule there announced, having been carefully worked out on the basis of the prior decisions of this court, and

having been impliedly rejected in the Waterman case, the Circuit Court was left without any rule to apply as to what evidence could be relied upon by the administrator to support his conclusions.

However, as stated above, the Waterman case does not support the rule for which it is cited. The judgment of the Fifth Circuit Court was reversed because this court found it in error in holding that the employer-employee relationship terminated at the end of the voyage, under the terms of the statutory shipping articles. Under its ruling, the court below found no occasion to review the evidence at all. Concluding that the relationship might be continued by the parties by agreement or custom, the provisions of the statute notwithstanding, this court was required to review the evidence which had not been considered by the court below. In contrast with the hearsay and conclusion evidence relied upon by the Administrator in this case, note the language of this court in the Waterman case:

> "All the evidence on this issue which the Board had before it was, of course, not been set out. In summary, it is glaringly apparent that men who had in various capacities followed the sea in the aggregate for roughly a hundred years, offered testimony that a seaman's tenure and relationship to his ship and employer are not terminated by the mere expiration of articles when his ship lays up in dry dock or for repairs, and that the Waterman Company—and maritime people generally—have recognized and followed this custom."

Here we find this court pointing to direct testimony. At no point does it rely on hearsay, surmise or suspicion. Whatever language this court may have used earlier in its opinion with reference to the importance of sustaining the findings of the board when supported by evidence, it is clear

that, in sustaining those findings, reliance was had upon evidence which was legal, competent, relevant, and substantial. Considering what was done, as contrasted with what was said, the rule laid down by the Fifth Circuit in *National Labor Relations Board v. Bell Oil and Gas Company, supra* (98 F. 2d. 406) need not have been rejected.

The second instance of the citation of inapposite decisions of this court is afforded by the holding by the Circuit Court of Appeals that "the Fair Labor Standards Act was a valid exercise of the power given to Congress by the Commerce Clause of the Federal Constitution, Article 1, Section 8, Clause 1". This statement and the authorities cited was in answer to Petitioner's contention that the administrative procedure and regulatory provisions provided by the act were not aimed at commerce in any sense in which the use of the term has ever received judicial sanction, and that the prohibitory provisions of the act, if left standing alone, would be meaningless. Thus such of the cases cited as deal with direct prohibitions against the movement of people or the sale or transportation of things for delivery across state lines, could have no application. In this class come the following cited cases:

Champion v. Ames, 188 U. S. 321; 23 S. Ct. 321; 47 L. Ed. 492.

Brooks v. United States, 267 U. S. 432; 45 S. Ct. 345; 69 L. Ed. 699.

Kentucky Whip and Collar Co. v. Illinois Central Railroad Co., 299 U. S. 334; 57 S. Ct. 277; 81 L. Ed. 270.

In the four other cases relied upon, this court was at pains to demonstrate that it was commerce, in its conventional signification, that Congress had undertaken to regulate. In two of the cases, this court upheld agricultural

marketing provisions by specific findings that the property must have been in commerce in order to come within the regulatory provisions of the Act.

Currin v. Wallace, 206 U. S. 1; 59 S. Ct. 379; 83 L. Ed. 441.

Mulford v. Smith, 307 U. S. 38; 59 S. Ct. 648; 83 L. Ed. 1092.

In the remaining two cases the court pointed out the necessity for a close and intimate relationship to interstate commerce to bring an activity within the regulatory power of the National Labor Relations Board.

National Labor Relations Board v. Jones and Laughlin Steel Corp., 301 U. S. 1; 57 S. Ct. 615; 81 L. Ed. 893.

Santa Cruz Fruit Packing Co. v. National Labor Relations Board, 303 U. S. 453; 58 S. Ct. 656; 82 L. Ed. 954.

In addition to the seven cases mentioned above, the court below cites the case of *Hammer v. Dagenhart*, 247 U. S. 251. As stated above, this case is directly in conflict with the rule in support of which it is cited.

IV—Authority or Power of the Administrator

The authority or power of the Administrator to promulgate the order under review is brought into question by several of the Specifications of Error supra. These contentions were urged before the Administrator himself on the hearing before him, and on petition for review to the court below. They called into question the power of the Administrator to change the definition of the industry after the appoinfment of a committee, thereby altering the percentage relationship of the committee to the industry and enabling the administrator, in effect, to exercise the primary functions of the committee in fixing classifications within the

industry. The power of the administrator to approve a recommendation of an industry committee, where the undisputed evidence shows that relevant factors, required by the Act to be considered by the committee, have not received consideration. The power of the administrator to promulgate a wage order without classification or differentials in wages, where the undisputed evidence shows the widest conceivable difference in wage rates, living costs, transportation costs, and other relevant factors, is brought into question. If the Congress had not intended that classifications be established in an industry where the relevant factors show so great a variation as in the textile industry, even as defined by the Administrator, no provision for such classification would have been included in the act.

There is grave doubt as to the extent and power of the administrator to control the recommendation of the committee and to promulgate an order thereon under any one of a number of circumstances present in this case. This doubt can be removed only by a grant of the writ of certiorari by this court and a review of the entire proceedings, with the view of laying down rules and fixing the limits of action on the part of the committee and the Administrator under the complete system of administrative action contemplated by Congress in the passage of the Fair Labor Standards Act.

CONCLUSION

For the reasons set out in the Petition and this brief, it is urged that this court grant its writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit, and that a full review be granted of the entire record and proceedings before the Circuit Court of Appeals and before the Administrator of the Wage and Hour Division of the Department of Labor.

Respectfully submitted,

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I, the undersigned member of the bar of this Court and Attorney for Petitioner and Intervenors, hereby certify that notice of the filing of the Petition for Certiorari, together with copy of the petition, printed record and supporting brief have been served on Counsel for the Respondent.

This 12th day of August, 1940.

Ben F. Cameron

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